UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JABARIE PHILLIPS,

Plaintiff,

v.

RON FRAKER, PRIVATE CONTRACTORS,

Defendants.

No. C12-1110 RBL/KLS

REPORT AND RECOMMENDATION
Noted For: January 11, 2013

This civil rights action has been referred to the undersigned United States Magistrate Judge Karen L. Strombom pursuant to Title 28 U.S.C. § 636(b)(1) and Local MJR 3 and 4. Plaintiff, a prisoner filing *pro se*, has been granted leave to proceed *in forma pauperis*. ECF No. 8. On October 12, 2012, the Court reviewed Plaintiff's Complaint (ECF No. 9) and found it to be deficient. The Court ordered Plaintiff to show cause why his complaint should not be dismissed. Alternatively, Plaintiff was given a deadline of November 2, 2012 to file an amended complaint. ECF No. 14. Plaintiff did not file an amended complaint or otherwise respond to the Court's Order.

Plaintiff has failed to state a cognizable claim pursuant to 42 U.S.C. § 1983. It is recommended that this case be **dismissed without prejudice.**

DISCUSSION

Under the Prison Litigation Reform Act of 1995, the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint

or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998).

A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim upon which relief may be granted if it appears the "[f]actual allegations . . . [fail to] raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true." *See Bell Atlantic, Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (citations omitted). In other words, failure to present enough facts to state a claim for relief that is plausible on the face of the complaint will subject that complaint to dismissal. *Id*. at 1974.

Although complaints are to be liberally construed in a plaintiff's favor, conclusory allegations of the law, unsupported conclusions, and unwarranted inferences need not be accepted as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Neither can the court supply essential facts that an inmate has failed to plead. *Pena*, 976 F.2d at 471 (quoting *Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). Unless it is absolutely clear that amendment would be futile, however, a pro se litigant must be given the opportunity to amend his complaint to correct any deficiencies. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, "the complaint [must provide] 'the defendant fair notice of what the plaintiff's claim is and the ground upon which it

rests.'" *Kimes v. Stone* 84 F.3d 1121, 1129 (9th Cir. 1996) (citations omitted). In addition, in order to obtain relief against a defendant under 42 U.S.C. § 1983, a plaintiff must prove that the particular defendant has caused or personally participated in causing the deprivation of a particular protected constitutional right. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

To be liable for "causing" the deprivation of a constitutional right, the particular defendant must commit an affirmative act, or omit to perform an act, that he or she is legally required to do, and which causes the plaintiff's deprivation. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

Plaintiff claims that on September 12, 2010, while he was at work cleaning the shower, he slipped, fell, and fractured his left arm. ECF No. 9, p. 3. He alleges that the surface where he fell was wet due to a leaking roof caused by the faulty work of unidentified private contractors hired by the Department of Corrections (DOC). Plaintiff also alleges that DOC medical staff failed to provide proper medical treatment and surgery that has left his left arm deformed. He seeks $1 million in damages. *Id.*, p. 4.

A. Ron Fraker, Superintendent

Plaintiff names Ron Fraker, Superintendent of the Clallam Bay Correctional Center, as a defendant. ECF No. 9, p. 3. However, there are no factual allegations contained in the complaint against Mr. Fraker.

A supervisory official is not liable for the actions of subordinates on a *respondeat superior* theory under 42 U.S.C. § 1983. *Jeffers v. Gomez*, 267 F.3d 895, 910, 915 (9th Cir.2001) (citing *Hansen v. Black*, 885 F.2d 642, 645–46 (9th Cir.1989)). "A supervisor may be liable under § 1983 only if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's

wrongful conduct and the constitutional violation." *Id*. (internal quotations omitted). A causal connection is "an affirmative link" between a constitutional deprivation and "the adoption of any plan or policy by [a supervisor,] express or otherwise showing [his or her] authorization or approval of such misconduct." *Rizzo v. Goode*, 423 U.S. 362, 371, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). The inquiry into causation "must be individualized" and focused on the duties and responsibilities of the individual defendant whose acts or omissions are alleged to have caused a violation. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir.1988).

Plaintiff was advised to set forth facts describing how Mr. Fraker was involved in the alleged violation of his constitutional rights. Although he was given an opportunity to amend his complaint to include these factual allegations, he failed to file an amended complaint or otherwise respond to the Court's order to show cause. This claim should be dismissed.

B. Slip and Fall

A claim pursuant to 42 U.S.C. § 1983 requires an allegation of the violation of a right secured by the Constitution and laws of the United States, and a showing that a person acting under color of state law committed the alleged deprivation. *West v. Atkins*, 487 U.S. 42, 48 (1988). Here, Plaintiff attempts to sue unnamed "private outside contractors" for an alleged leak in the roof that he believes caused the slippery surface on which he fell.

First, Plaintiff was advised that "[a]lthough mere negligence may support a state tort claim, it is not actionable under section 1983." *Daniels v. Williams*, 474 U.S. 327, 333 (1986)). The allegations contained in Plaintiff's complaint merely state a cause of action for negligence. *See Jackson v. Arizona*, 885 F.2d 639, 641 (9th Cir.1989) (holding that slippery floors, without more, do "not state even an arguable claim for cruel and unusual punishment"), *superseded by statute as stated in, Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir.2000). To file a complaint

based upon a violation of his constitutional rights, plaintiff is required to meet a higher standard thannegligence. To pursue his claim here, he must show that prison officials were deliberately indifferent to his safety by consciously disregarding an excessive risk of harm to his health. *See Farmer v. Brennan*, 511 U.S. 825, 833-38 (1994); *see also Wilson v. Seiter*, 501 U.S. 294, 302 (1991) ("[O]ur cases say that the offending conduct must be wanton.")

Second, Plaintiff attempts to sue unidentified "private outside contractors." Generally, private actors are not acting under color of state law. *See Price v. Hawaii*, 939 F.2d 702, 707-08 (9th Cir.1991). In order to determine whether a private actor acts under color of state law for § 1983 purposes, the Court looks to whether the conduct causing the alleged deprivation of federal rights is fairly attributable to the state. *Id.* (citing *Lugar v. Edmundson Oil Co., Inc*., 457 U.S. 922, 937 (1982)). Conduct may be fairly attributable to the state where (1) it results from a governmental policy and (2) the defendant is someone who fairly may be said to be a governmental actor. *Sutton v. Providence St. Joseph Med. Ctr*., 192 F.3d 826, 835 (9th Cir.1999) (citing *Lugar*, 457 U.S. at 937). A private actor may be considered a governmental actor "because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Lugar*, 457 U.S. at 937. The Court, however, begins with the presumption that private actors are not acting undercolor of state law. *See Sutton*, 192 F.3d at 835. "In order for private conduct to constitute governmental action, 'something more' must be present." *Id*. (quoting *Lugar*, 457 U.S. at 939).

The Court may employ various tests in determining whether "something more" exists, including: (1) the public function test-where a private actor exercises powers traditionally exclusively reserved to the State; (2) the joint action test-where a private actor is a willful participant in joint activity with the State or its agents; (3) the state compulsion test-where the

State exercises coercive power or provides such significant encouragement that the private actor's choice must be deemed to be that of the State; and (4) the governmental nexus test-where there is a sufficiently close nexus between the State and the challenged action such that the action of the private actor may be fairly treated as that of the State. *Johnson v. Knowles*, 113 F.3d 1114, 118-20 (9th Cir.1997) (cited sources omitted). Courts have also looked to whether there is "pervasive entwinement" between private and public entities. *See, e.g., Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298-99 (2001) (finding state action where "[t]he nominally private character of [a statewide athletic association was] overborne by the pervasive entwinement of public institutions and public officials in its composition and workings [ ]"). However, there is no specific formula to apply. *See Sutton*, 192 F.3d at 836. Instead, courts typically look to whether there is a sufficiently close nexus between the state and the challenged conduct. *Id*. Moreover, the question is individualized and dependent on the factual circumstances. *Id*.

Here, Plaintiff has not named any contractors and there are no factual circumstances for the Court to consider. Plaintiff was given an opportunity to amend his complaint to include these factual allegations. He has failed to do so or to otherwise respond to the Court's show cause order. This claim should be dismissed.

C. Eighth Amendment – Medical Care

Plaintiff was advised that to state a claim for denial or insufficient medical care under the Eighth Amendment, he must allege a serious medical need and that defendants were deliberately indifferent to those needs. Deliberate indifference to an inmate's serious medical needs violates the Eighth Amendment's proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). Deliberate indifference includes denial, delay or intentional

interference with a prisoner medical treatment. *Id* at 104-05. To succeed on a deliberate indifference claim, an inmate must demonstrate that the prison official had a sufficiently culpable state of mind. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). A determination of deliberate indifference involves an examination of two elements: the seriousness of the prisoner's medical need and the nature of the defendant's response to that need. *McGuckin v. Smith*, 954 F.2d 1050 (9th Cir. 1992). A "serious medical need" exists if the failure to treat a prisoner's condition would result in further significant injury or the unnecessary and wanton infliction of pain contrary to contemporary standards of decency. *Helling v. McKinney*, 509 U.S. 25, 32-35; *McGuckin*, 954 F.2d at 1059.

Second the prison official must be deliberately indifferent to the risk of harm to the inmate. *Farmer*, 511 U.S. at 834. To withstand summary dismissal, a prisoner must not only allege he was subjected to unconstitutional conditions, he must allege facts sufficient to indicate that the officials were deliberately indifferent to his complaints. *Id.* Differences in judgment between an inmate and prison medical personnel regarding appropriate medical diagnosis and treatment are not enough to establish a deliberate indifference claim. *See Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). Further, mere indifference, medical malpractice, or negligence will not support a cause of action under the Eighth Amendment. *Broughton v. Cutter Lab.*, 622 F.2d 458, 460 (9th Cir. 1980).

Plaintiff was advised that he must provide factual allegations to describe his claim, including the nature of his condition, which defendant denied him care or provided inappropriate care for his condition, and when this occurred. Plaintiff was also advised that it is not enough for Plaintiff to claim that the "medical staff" failed to provide him with adequate medical care. He must name the individuals who denied him medical care and how their failure to do so deprived

him of his constitutional rights. Plaintiff was given an opportunity to amend his complaint to include these factual allegations. He has failed to do so or to otherwise respond to the Court's show cause order. This claim should be dismissed.

CONCLUSION

Plaintiff was previously advised that he failed to assert denial of a right secured by the Constitution or laws of the United States. Plaintiff was given an opportunity to show cause why his complaint should not be dismissed or to file an amended complaint. He failed to file an amended complaint or otherwise respond to the Court's Order. Plaintiff has failed to state a cognizable claim pursuant to 42 U.S.C. § 1983. Accordingly, it is recommended that this case **dismissed without prejudice.**

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **January 11, 2013,** as noted in the caption.

DATED this 26th day of December, 2012.

Karen L. Strombom
United States Magistrate Judge